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No. 91-1118

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

STAN BAUMANN, PETITIONER

v.

SAVERS FEDERAL SAVINGS & LOAN ASSOCIATION, ET. AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly exercised its discretion in permitting the Resolution Trust Corporation as receiver for a failed depository institution to raise federal defenses for the first time on appeal where the lower court's judgment had been entered prior to the receiver's appointment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 934 F.2d 1506. The opinion of the state trial court (Pet. App. A27-A30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1991. The order denying petitions for rehearing was filed on October 8, 1991. The petition for a writ of certiorari was filed on January 6, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a real estate developer, obtained a loan in 1984 from Savers Federal Savings & Loan Association (Savers Federal) to build a retail shopping center in Plantation, Florida. Savers Federal initially loaned petitioner $7.5 million for the project and received as security a mortgage and security interest. Petitioner also executed a promissory note in favor of Savers Federal, and agreed to pay interest on the loan, as well as certain other costs. Petitioner and his wife personally guaranteed the note. See Pet. App. A6-A7.

Before construction on the project began, the City of Plantation Planning Board refused to grant its approval, and recommended that the proposed site be rezoned to prevent certain commercial uses. Pet. App. A7. In order to comply with the City's desires regarding appropriate uses for the site, petitioner proposed a new development. This new development was a more costly project, and Savers Federal agreed to increase the total amount of its loan to petitioner to $9.75 million. Petitioner accordingly signed a second promissory note for the additional amount of the loan, and he and his wife again guaranteed the loan. *Ibid.*

By late 1986, after Savers Federal had advanced more than $8 million of the loan amount, construction of the project came to a halt. Petitioner defaulted on the loan and could not pay his contractors. Pet. App. A7.

2. In December 1986, petitioner filed suit against Savers Federal in Florida state court, claiming that the failure of the project was due to Savers Federal's breach of the loan agreements and failure to cooperate with petitioner. Savers Federal counterclaimed, seeking to foreclose on the mortgage and to collect on the

promissory note. Savers Federal also sought to enforce the personal guaranty of petitioner and his wife. Pet. App. A7-A8.

In December 1988, after a jury trial, the jury found that Savers Federal had breached its loan agreements with petitioner and its statutory duty of good faith, and had impaired petitioner's collateral.[1] The jury awarded $15.4 million in damages on the breach of contract and breach of good faith claims, and $8.74 million on the impairment of collateral claim. The court offset this amount by the $8,034,797 in principal and interest that was due on the loan. On January 25, 1989, the state trial court entered final judgment awarding petitioner a net judgment of $7,365,203.[2] Pet. App. A8-A9.

3. On February 10, 1989, the Federal Home Loan Bank Board (FHLBB)[3] declared Savers Federal insolvent, and appointed the Federal Savings and Loan Insurance Corporation (FSLIC)[4] conservator of

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[1] At trial, petitioner relied on certain purported oral understandings that Savers Federal would be his partner in the project and would do everything possible to ensure the timely and efficient completion of the project because he was a preferred customer. Pet. App. A8.

[2] In arriving at this net amount, the court ignored the jury's award to petitioner of $8.74 million for the impairment of collateral. See Pet. App. A8-A9.

[3] The Federal Home Loan Bank Board was a federal agency created pursuant to the Federal Home Loan Bank Act, ch. 522, § 17, 47 Stat. 736, formerly codified at 12 U.S.C. 1437 (repealed 1989). The FHLBB was charged with chartering and supervising savings and loan associations and directing the operations of the Federal Savings and Loan Insurance Corporation.

[4] The Federal Savings and Loan Insurance Corporation was a federal instrumentality created pursuant to the National Housing Act, ch. 847, § 402, 48 Stat. 1256, formerly codified at

Savers Federal. By virtue of its status as conservator, FSLIC became a party to the litigation. On February 13, 1989, FSLIC removed the case from the state court to federal district court pursuant to 12 U.S.C. 1730(k)(1)(C). FSLIC and Savers Federal then filed a notice of appeal from the Florida state court's final judgment to the United States Court of Appeals for the Eleventh Circuit. Petitioner filed a notice of cross-appeal. See Pet. App. A9.

On March 10, the district court remanded the case to state court, finding that it had been improperly removed. On April 24, however, the court of appeals granted FSLIC and Savers Federal's petition for writ of mandamus; the court held that the case was properly in federal court and should be treated as though the state court proceedings had occurred in federal district court. *In re Savers Fed. Sav. & Loan Ass'n*, 872 F.2d 963 (11th Cir. 1989). Pet. App. A9.

4. On August 9, 1989, the President signed into law the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. Under Section 501(a) of FIRREA, 103 Stat. 369, the newly-created Resolution Trust Corporation (RTC) was substituted for FSLIC in situations, such as this case, where FSLIC was acting as conservator of a financial institution.[5] On October 4, 1989, the RTC conducted a purchase and assumption transaction. First, the Director of the Office of

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12 U.S.C. 1725 (repealed 1989), to insure deposit accounts in savings and loan associations. The FSLIC was under the direction of the FHLBB.

[5] The RTC assumed the FSLIC liquidation function for all savings and loan institutions placed in conservatorship or receivership after January 1, 1989. FIRREA, § 501(a), 103 Stat. 369, 12 U.S.C. 1441a(b)(3)(A) (Supp. I 1989).

Thrift Supervision (OTS) transferred Savers Federal from a conservatorship to a receivership. OTS also chartered another institution, Savers Savings Association Institution (Savers Savings) which purchased all assets of Savers Federal, including Savers Federal's claims against petitioner. Liabilities of Savers Federal, including petitioner's judgment in this case, were retained by RTC as receiver of Savers Federal. Simultaneously, OTS declared Savers Savings insolvent and appointed RTC as conservator. See Pet. App. A9-A10.

5. The court of appeals reversed and remanded to federal district court for a new trial. The court held that the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), applies in this case, and that the RTC should be permitted to assert the defense for the first time on appeal. Pet. App. A1-A26. The *D'Oench* doctrine holds that a party is barred from enforcing an agreement against a federal receiver or conservator of a depository institution if the agreement is not documented in the institution's records. See *Langley* v. *FDIC*, 484 U.S. 86 (1987) (dealing with 12 U.S.C. 1823(e), the statutory counterpart to the *D'Oench* doctrine).[6] Petitioner's claim was based in part on oral

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[6] Although the RTC also raised 12 U.S.C. 1823(e) (Supp. I 1989), against petitioner's purported reliance on oral, unrecorded understandings with Savers Federal, the court of appeals discussed only the applicability and timeliness of raising the *D'Oench* doctrine. Pet. App. A10-A26.

Section 1823(e) bars the assertion of an agreement against the FDIC to defeat or diminish the FDIC's interest in an asset unless the agreement meets each of four requirements: (1) it must be in writing; (2) it must have been executed by both the bank and the obligor contemporaneously with the acquisition of the asset by the failed bank; (3) it must have been approved by the bank's board of directors or loan committee and the

understandings between him and Savers Federal that were not recorded in the loan documents. Because it was not clear that the jury did not rely on the alleged oral understandings in reaching its verdict, the court of appeals ordered a new trial. Pet. App. A22-A26.

After rejecting the RTC's argument that FIRREA specifically grants it the *right* to raise special federal defenses for the first time on appeal, Pet. App. A11-A14, the court determined that it would nonetheless exercise its discretion to consider the RTC's *D'Oench* defense.[7] The RTC had no opportunity to raise the defense below because it did not become a party until after the state trial court's judgment had been rendered. In these circumstances, the court of

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approval must be reflected in the minutes of the board or committee; and (4) it must have been continuously maintained as an official bank record. Section 1823(e) was enacted in 1950 as a codification of the *D'Oench* doctrine. See Act of Sept. 21, 1950, ch. 967, §§ 2, 13(e), 64 Stat. 873, 889. The original version of the statute applied only to the FDIC, but the statute was amended by FIRREA, § 501(a), 103 Stat. 369, to apply to the RTC as well. See 12 U.S.C. 1441a(b)(4) (Supp. I 1989); *RTC* v. *McCrory*, 951 F.2d 68, 71 (5th Cir. 1992).

[7] The RTC argued that it is entitled as a matter of right to raise the *D'Oench* defense under 12 U.S.C. 1821(d)(13) (Supp. I 1989). Pet. App. A11-A12. Section 1821(d)(13)(A) provides that the FDIC "shall abide by any final unappealable judgment of any court of competent jurisdiction" which was rendered before the appointment of the FDIC as conservator or receiver. Section 1821(d)(13)(B)(i) further provides that in the event of any appealable judgment, the FDIC as conservator or receiver shall have "all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights." This provision is applicable to the RTC by virtue of 12 U.S.C. 1441a(b)(4) (Supp. I 1989), which grants the RTC the same conservatorship and receivership powers as the FDIC.

appeals held that it was proper to consider the defense for the first time on appeal. See Pet. App. A14-A19 (citing *Dean Witter Reynolds, Inc.* v. *Fernandez*, 741 F.2d 355, 360-361 (11th Cir. 1984)).[8]

On the merits, the court held that the jury's verdict in favor of petitioner was tainted by the introduction of testimony regarding oral understandings between him and Savers Federal, and that a new trial was therefore necessary. Pet. App. A22-A25. The court rejected, however, RTC's argument that it was entitled to judgment as a matter of law, because a jury could find in petitioner's favor based only on the written terms of the agreements between the parties. *Id.* at A25-A26.

ARGUMENT

The court of appeals did not abuse its discretion in permitting the *D'Oench* defense to be raised for the first time on appeal, because the defense became available only after the federal agency became a party to the litigation, which occurred after the lower court entered its judgment. The decision below is correct, and does not conflict with any decision of this Court or another court of appeals. Accordingly, further review is not warranted.

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[8] *Dean Witter Reynolds, Inc.* describes five situations where it is appropriate for an appellate court to entertain arguments not raised before the trial court: (1) the issue involves a pure question of law, and refusal to consider it would result in a miscarriage of justice; (2) the appellant raises an objection to an order which it had no opportunity to raise at the district court level; (3) the interest of substantial justice is at stake; (4) the proper resolution is beyond any doubt; and (5) the issue presents significant questions of general impact or of great public concern. See 741 F.2d at 360-361.

1. Although the usual rule is that issues not presented to a trial court will not be considered on appeal, the courts of appeals have discretion to address issues raised for the first time on appeal in appropriate circumstances. See, *e.g.*, *FDIC* v. *232, Inc.*, 920 F.2d 815, 817 (11th Cir. 1991). In this case, the Eleventh Circuit correctly determined that one such circumstance was present, namely "where the appellant raises an objection to an order which he had no opportunity to raise at the district court level," *Dean Witter Reynolds, Inc.* v. *Fernandez*, 741 F.2d at 361. See Pet. App. A15.[9] The RTC had no opportunity to raise its federal defenses in the trial court, because it was not appointed conservator of Savers Savings, and thus did not become a party to this litigation, until after the trial court issued final judgment. As the court of appeals noted (*id.* at A15-A16), there was no suggestion in this case that RTC strategically reserved its federal defenses or was careless in failing to raise the issue at an earlier time.

2. Petitioner contends (Pet. 19) that the decision below conflicts with decisions of the Fifth and Tenth Circuits. See *Grubb* v. *FDIC*, 868 F.2d 1151 (10th Cir. 1989); *Olney Sav. & Loan Ass'n* v. *Trinity Banc Sav. Ass'n*, 885 F.2d 266 (5th Cir. 1989); *Thurman* v. *FDIC*, 889 F.2d 1441 (5th Cir. 1989). That contention is without merit. As the court of appeals noted (Pet. App. A18-A19), *Grubb* and *Olney* stand for the proposition that a federal receiver or conservator may not raise its federal defenses for the first time on appeal when the district court's judgment establishes that an asset is *void*. See *Langley* v. *FDIC*, 484 U.S. 86, 93-94

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[9] The court of appeals thus had no occasion to determine whether any of the other *Dean Witter Reynolds* factors also supported considering the defense. See note 8, *supra*.

(1987) (noting that 12 U.S.C. 1823(e) defense would not be available if the asset at issue were void). In those circumstances, the courts have held, the receiver or conservator acquires no "right, title or interest" in the asset upon takeover of the failed institution. See *Olney*, 885 F.2d at 274-275; *Grubb*, 868 F.2d at 1158-1159. In this case, by contrast, there was no contention that the trial court's judgment rendered the loan agreements void. To the contrary, the judgment required Savers Federal to pay damages based on the breach of valid agreements, and awarded Savers Federal the right to collect the principal and interest due on the loan. Unlike the situation in *Olney* and *Grubb*, the RTC as receiver for Savers Federal therefore continued to hold a valid interest in the loan agreements even after the state court issued its judgment.

Petitioner's reliance on the Fifth Circuit's decision in *Thurman* v. *FDIC*, *supra*, is also unavailing. Even if petitioner were correct that *Thurman* is in tension with the Eleventh Circuit's decision in the present case, subsequent decisions from the Fifth Circuit make clear that there remains no tension between the Fifth and Eleventh Circuits on the issue presented in this case. See *RTC* v. *McCrory*, 951 F.2d 68 (5th Cir. 1992); *Union Fed. Bank* v. *Minyard*, 919 F.2d 335, 336 (5th Cir. 1990) (per curiam).[10]

In *McCrory*, the Fifth Circuit allowed the RTC as conservator for a failed institution to raise its special

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[10] We note that the Fifth Circuit has itself distinguished *Olney* and *Thurman* on the basis that they are applicable only where the asset at issue has been found to be void by the lower court. See *RTC* v. *McCrory*, 951 F.2d at 71 ("when the district court's judgment establishes that an asset is void, federal regulators appointed after the entry of judgment have not been allowed to assert" the *D'Oench* and Section 1823(e) defenses, citing *Thurman*, 889 F.2d at 1447; *Olney*, 885 F.2d at 275).

federal defense under 12 U.S.C. 1823(e) (Supp. I 1989) for the first time on appeal. The RTC as conservator intervened after the district court's final judgment in favor of the RTC's predecessor. On appeal, the RTC invoked the special protection of Section 1823(e) as an alternate ground for affirmance, and the Fifth Circuit affirmed the judgment on that ground. 951 F.2d at 71-72. The Fifth Circuit left no ambiguity as to its agreement with the Eleventh Circuit's approach in the present case:

> In *Minyard*, we emphasized that the federal regulator had no opportunity to raise its special defense in the trial court, and implied that it should not be penalized on appeal for that lack of opportunity. 919 F.2d at 336; *accord Baumann*, 934 F.2d at 1512-13. Under these circumstances, it is not improper for us to consider the argument for the first time on appeal.

951 F.2d at 71. See also *Minyard*, 919 F.2d at 336 ("As the FDIC had neither opportunity nor occasion to assert the D'Oench doctrine in the trial court, we will entertain its assertion here."). Contrary to petitioner's contention, there is therefore no disagreement between the Fifth and Eleventh Circuits as to the appropriateness of permitting a federal conservator of a financial institution to raise its special defenses for the first time on appeal where there was no opportunity to raise the defenses at the trial court level.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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